Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
Implementation of Section 601(d) of the Telecommunications Act of 1996	)	

REPORT AND ORDER

Adopted: September 30, 1997 **Released:** October 3, 1997

By the Commission (Commissioner Quello issuing a separate statement):

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I. INTRODUCTION

1. In this Report and Order, we review our existing regulatory safeguards for the provision of broadband commercial mobile radio services (CMRS)[1] by incumbent local exchange carriers (incumbent LECs) and their affiliates. We set forth a framework for such safeguards that, for the first time, treats incumbent LEC provision of all broadband CMRS consistently, and that is narrowly tailored to address specific concerns about potential anticompetitive use by the incumbent LECs of market power derived from their control of "bottleneck" wireline local exchange facilities. We adopt these safeguards to address concerns that recent developments in the CMRS market -- such as direct competition among telecommunications carriers facilitated by the 1996 amendments to the Communications Act, increased competition in the CMRS marketplace, and the development of fixed wireless services -- may increase the incentive for anticompetitive behavior by incumbent LECs. We believe that incumbent LECs and broadband CMRS operators are increasingly likely to be direct competitors. The competitive pressure brought to bear on the local exchange market by broadband CMRS providers could increase the incentive for incumbent LECs to engage in anticompetitive practices, such as discriminatory interconnection, cost-shifting, and anticompetitive pricing practices. Consistent with the pro-competitive, deregulatory objectives of the Telecommunications Act of 1996,[2] we establish safeguards that will help to ensure fair rules of competition, while doing so in the least burdensome manner possible that directly addresses the potential for anticompetitive behavior.

2. The order we adopt today responds directly to the Sixth Circuit's *Cincinnati Bell Telephone Co. v. FCC* decision,[3] in which that court remanded to the Commission its previous decision to maintain structural safeguards for Bell Operating Company (BOC)[4] provision of cellular services under Section 22.903 of the Commission's rules,[5] but to permit BOCs to provide broadband PCS services under a plan of nonstructural safeguards. In addition, we are

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[1] This Order addresses safeguard issues with respect to services referred to as broadband CMRS, *i.e.*, services offered on spectrum allocated to Domestic Public Cellular Radio Telecommunications Service (cellular), Specialized Mobile Radio (SMR), and broadband Personal Communications Services (PCS) that also meet the statutory definition of CMRS under Section 332(d) of the Communications Act. Broadband PCS is defined as PCS services operating in the 1850-1890 MHz, 1930-1970 MHz, 2130-2150 MHz, and 2180-2200 MHz bands. 47 C.F.R. § 24.5.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act).

[3] *Cincinnati Bell Telephone v. FCC*, 69 F.3d 752 (6th Cir. 1995) (*Cincinnati Bell*).

[4] We define a BOC as it is defined in Section 3(4) of the Communications Act of 1934, as amended (the Communications Act), 47 U.S.C. § 153(4).

[5] 47 C.F.R. § 22.903.

adopting rule changes necessary to implement those provisions of the 1996 Act that govern joint marketing of CMRS and landline services, and network information disclosure.

3. In the Notice of Proposed Rulemaking (*Notice*) in this docket,[6] the Commission proposed two options for LEC provision of broadband CMRS: (1) retain the structural safeguards of Section 22.903 for BOC provision of in-region cellular service, but sunset the restrictions for a particular BOC when that BOC receives authorization to provide interLATA[7] service originating in any in-region state;[8] or (2) eliminate the structural safeguards of Section 22.903 immediately in favor of uniform safeguards for all Tier 1 LECs offering broadband CMRS.[9] In this proceeding the Commission seeks to implement further the mandate of the 1993 Budget Act[10] to promote regulatory symmetry among commercial mobile radio services. In addition, we are examining whether Section 22.903, and the disparate treatment of cellular compared with other broadband CMRS services, is still necessary or if changed circumstances have obviated the need for Section 22.903 structural separations for BOC provision of cellular.

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[6] Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, *Notice of Proposed Rulemaking, Order on Remand, and Waiver Order*, 11 FCC Rcd 16639 (1996). In response to the *Notice*, 20 comments and 13 reply comments were filed. A list of commenters is attached as Appendix A.

[7] InterLATA, as defined in Section 3(21) of the Communications Act, is "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21).

[8] *See* 47 U.S.C. § 271(j).

[9] The term "Tier 1 LEC" traditionally referred to a local exchange carrier having annual revenues from regulated operations of $100 million or more. For accounting purposes, the Commission now uses the terms "Class A" and "Class B" companies as defined in 47 C.F.R. §§ 32.11(a)(1) and (2) to differentiate large and small carriers. We will use the term "Class A LEC" instead of "Tier 1 LEC" throughout this Report and Order, except when referring to proposals in the *Notice*. Pursuant to Section 402(c) of the 1996 Act, the revenue threshold of Class A LECs has been indexed to inflation. The interim revenue thresholds applicable to annual operating revenues from 1993, 1994, and 1995 are $102 million, $104 million, and $107 million, respectively. Implementation of the Telecommunications Act of 1996: Reform of Filing Requirements and Carrier Classifications, CC Docket No. 96-193, *Order and Notice of Proposed Rulemaking*, 11 FCC Rcd 11716, 11722, ¶ 12 (1996) (*402 Order and NPRM*).

[10] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) (1993 Budget Act). We also note that one of the Congressional objectives in amending Section 332 of the Communications Act to permit preemption of state rate and entry regulation and forbearance from the more burdensome provisions of Title II was to ensure an appropriate level of regulation for CMRS providers. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Service, GN Docket No. 93-252, *Report and Order*, 9 FCC Rcd 1411, 1504, ¶ 250 (1994) (*CMRS Second Report and Order*).

4. For the reasons discussed in this Order, we adopt the second option proposed in the *Notice*, with some modifications, and modify our current Part 22 requirement that BOCs must provide cellular service through a separate corporation that meets the structural separation requirements of Section 22.903 (*e.g.*, separate officers and personnel, separate computer and transmission facilities in the provision of cellular services.) Except for rural telephone companies,[11] all incumbent LECs[12] -- BOCs and independent LECs -- will be required to provide in-region broadband CMRS, including cellular services, through a CMRS affiliate, subject to the accounting and affiliate transactions rules in Parts 32 and 64 of the Commission's rules.[13] Such CMRS affiliates, however, will not be subject to the full panoply of structural separations requirements currently provided for in Section 22.903. Rural telephone companies will be exempt from the requirement of providing CMRS through a separate affiliate; however, a competing carrier, interconnected with the rural carrier, may petition the Commission to remove the exemption, or the Commission may do so on its own motion, where the rural telephone company has engaged in anticompetitive conduct, such as discrimination. Companies serving fewer than two percent of the nation's subscriber lines that seek to provide broadband CMRS may petition the Commission for suspension or modification of the requirement that broadband CMRS be provided through a separate affiliate. We believe that the Commission's accounting rules, price cap regulation,

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[11] Rural telephone company is defined in Section 3(37) of the Communications Act, as follows: "The term "rural telephone company" means a local exchange carrier operating entity to the extent such entity -

(A) provides common carrier service to any local exchange carrier study area that does not include either -

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or incorporated, included in an urbanized area, as defined by the Bureau of Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996."

47 U.S.C. § 153(37).

[12] An incumbent local exchange carrier is defined in Section 251, with respect to an area, as the local exchange carrier that (A) on the date of enactment of the Telecommunications Act of 1996, provided local exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to Section 69.601(b) of the Commission's regulations (47 C.F.R. § 69.601(b)); or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i). 47 U.S.C. § 251(h)(1).

[13] The Commission recently concluded a proceeding reviewing these safeguards and determined that the existing safeguards remain relevant in light of the 1996 Act. *See* Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, *Report and Order*, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*).

interconnection requirements,[14] and the separate CMRS affiliate requirements adopted in this Report and Order will curb the ability and incentive of incumbent LECs and their CMRS affiliates to engage in anticompetitive behavior and help the Commission to detect and deter discrimination.

II. EXECUTIVE SUMMARY

5. In this Order, we make the following modifications to our rules and procedures regarding incumbent LEC provision of broadband CMRS services.

- With regard to incumbent LECs, including BOCs, that continue to have the incentive and ability to use control of "bottleneck" local exchange facilities to engage in anticompetitive behavior, we require such incumbent LECs to provide in-region broadband CMRS through a separate CMRS affiliate.

- Specifically, incumbent LECs subject to our CMRS affiliate requirements must establish a separate corporation for in-region broadband CMRS operations. This separate affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with its affiliated LEC that the LEC uses for the provision of local exchange services in the same in-region market; and (3) acquire any services from the affiliated LEC on a compensatory arm's length basis pursuant to our affiliate transaction rules. Title II common carrier services or services, facilities, or network elements provided pursuant to Sections 251 and 252 that are acquired from the affiliated LEC must be available to all other carriers, including CMRS providers, on the same terms and conditions. The CMRS affiliate and the LEC may share officers, directors, and other personnel. In addition, the CMRS affiliate may own its own landline facilities and offer competitive landline local exchange (CLLE) service without restriction on technology.

- We conclude that we should not impose any structural separation requirements for incumbent LECs where they have little incentive and ability to use the control of "bottleneck" local exchange facilities to affect competition. Accordingly, we do not require a separate affiliate for the CMRS service area outside the incumbent LEC's wireline service territory. We believe it is appropriate to apply "in-region" CMRS structural safeguards only to an incumbent LEC whose wireline service area substantially overlaps its CMRS license area to a significant degree, *i.e.*, we require a separate affiliate for in-region CMRS only when at least 10 percent of the total population of the CMRS licensed service area is within the incumbent LEC's wireline service area.

- Rural telephone companies are exempt from the separate affiliate requirement. A competing carrier, interconnected with the rural carrier may petition the Commission to

[14] *See* Sections 251 and 252 of the Communications Act. 47 U.S.C. §§ 251, 252.

remove the exemption, or the Commission may do so on its own motion, where the rural telephone company has engaged in anticompetitive conduct, such as discrimination.

- Companies serving fewer than two percent of the nation's subscriber lines may petition the Commission for suspension or modification of the separate affiliate requirement.

- Except for subsection 22.903(f) (discussed below), we eliminate the specific subsections of Section 22.903 governing provision of cellular service by the BOCs.

- Pending the outcome of our separate proceeding regarding Section 222 of the Communications Act, we retain the requirement of Section 22.903(f) that BOCs must not provide to their wireless affiliates any customer proprietary network information (CPNI) unless such information is publicly available on the same terms and conditions.

- Section 601(d) of the 1996 Act permits a BOC, or any other company, to jointly market and sell wireless and wireline services. This Order provides that, when engaging in joint marketing, all incumbent LECs, other than LECs exempt from the separate affiliate requirement, must adhere to the Commission's affiliate transactions rules, reduce their agreements to writing, and make copies of such agreements publicly available (as defined in the *Accounting Safeguards Order*).

- The separate affiliate requirement will sunset on January 1, 2002, unless the Commission determines that the competitive conditions in the local exchange market are such that continuation of these safeguards is in the public interest.

III. BACKGROUND

A. Safeguards Under Section 22.903 for BOC Provision of Cellular Service

6. Under our existing rules, we regulate BOC provision of cellular service differently from both non-BOC provision of cellular service and BOC and non-BOC provision of broadband CMRS other than cellular. The original version of Section 22.903 was adopted as Section 22.901 in 1981, when the Commission amended Part 22 of the rules to provide for the authorization of two cellular licensees in each market -- one wireline carrier and one non-wireline carrier.[15] To preserve the competitive potential of the non-wireline cellular provider, the Commission required the wireline carrier to provide its cellular service through a structurally separate affiliate, *i.e.*, an independent corporation with separate officers, separate books of account, and separate operating, marketing, installation and maintenance personnel.

[15] *See* Cellular Communications Systems, 86 FCC 2d 469 (1981) (*Cellular Order*); Cellular Communications Systems, 89 FCC 2d 58 (1982) (*Cellular Reconsideration Order*); and Cellular Communications Systems, 90 FCC 2d 571 (1982) (*Cellular Further Reconsideration Order*).

The Commission also prohibited the wireline carrier's cellular affiliate from owning facilities for the provision of landline telephone service.[16] These structural separation requirements were intended to prevent wireline carriers from using their market power in the local exchange market to engage in anticompetitive practices, such as improper cost allocation between the wireline carrier and its cellular affiliate and discrimination by the wireline carrier in favor of its cellular affiliate.[17]

7. Section 22.903 comprises two principal parts: the requirement that BOCs provide cellular service through a structurally separate corporation; and a series of restrictions on the separate affiliate, including restrictions on use and ownership of landline transmission facilities and requirements for the independent operation of the separate cellular affiliate through separate books of account, officers, operating, marketing, installation and maintenance personnel and utilization of separate computer and transmission facilities in the provision of cellular service. In addition, subsection (d) requires that all transactions between the BOC and the cellular affiliate be reduced to writing and that a copy of all agreements (other than

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[16] *Cellular Order*, 86 FCC 2d at 493-95. In 1982, the Commission revised Section 22.901 to apply only to AT&T and its affiliates. *Cellular Reconsideration Order*, 89 FCC 2d at 79. In 1983, the Commission further amended Section 22.901 in response to the breakup of AT&T under the divestiture agreement entered into by AT&T and the Department of Justice. Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No. 83-115, *Report and Order*, 95 FCC 2d 1117, 1120 (1984) (*BOC Separation Order*), *affirmed sub nom. Illinois Bell Telephone Company v. FCC*, 740 F.2d 465 (1984), *affirmed on recon.*, 49 Fed. Reg. 26056, FCC 84-252 (1984), *affirmed sub nom. North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th Cir. 1985). Under the divestiture agreement, the 23 BOCs owned by AT&T were divested and consolidated into seven regional holding companies. *U.S. v. American Telephone & Telegraph Company and U.S. v. Western Electric Company* , Modification of Final Judgement, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983) (*MFJ*). The Commission concluded that BOC control over local exchange services provided an opportunity for anticompetitive conduct with respect to customer premises equipment (CPE), enhanced services, and cellular services, much the same as it did for AT&T. *BOC Separation Order*, 95 FCC 2d at 1131-37.

[17] That approach to BOC entry into cellular service is similar to the one adopted in several sections of the 1996 Act, under which BOCs may enter into in-region interLATA telecommunications services and interLATA information services, manufacturing, and electronic publishing services only through separate corporate affiliates, pursuant to specified structural, transactional, accounting, and non-discrimination requirements. *See* 47 U.S.C. §§ 271, 272; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *recon. pending, petition for review pending sub nom., Bell Atlantic v. FCC*, No. 97-106 (D.C. Cir. filed Jan. 31, 1997), *vacated and remanded in part* (Mar. 31, 1997), *petition for review pending sub nom., SBC Communications v. FCC*, No. 97-1118 (D.C. Cir. filed Mar. 6, 1997). Sections 260 and 271 through 276 outline the conditions under which incumbent local exchange carriers may offer telemessaging and alarm monitoring services and under which the BOCs may manufacture and market telecommunications equipment, may manufacture customer premises equipment ("CPE"), and may offer interLATA telecommunications, information, electronic publishing and payphone services. In some cases, separate affiliates are required. In other cases, integrated operation is permitted. *See, e.g.*, 47 U.S.C. §§ 260(a), 276(a).

interconnection agreements) between such entities be kept available for inspection upon reasonable request by the Commission. It also requires that all affiliate contracts with respect to cellular/landline interconnection be filed with the Commission, although that requirement does not apply to transactions governed by an effective state or federal tariff. Subsection (e) prohibits BOCs from engaging in the sale or promotion of cellular service on behalf of their cellular affiliates. This prohibition does not extend to joint advertising or promotions by the landline carrier and the affiliate. Finally, the rule prohibits the provision of BOC CPNI to the cellular affiliate, unless such CPNI is made publicly available on the same terms and conditions.

B. Section 22.903 Separate Affiliate Not Required for LEC Provision of PCS and SMR

8. Section 22.903 applies only to BOC provision of cellular service. Structural safeguards are not required for LEC, including BOC, provision of other CMRS, such as broadband PCS.[18] In addition, non-BOC LECs may provide cellular service without structural safeguards.[19] In the *Broadband PCS Second Report and Order*, we concluded that the record was not adequate to determine whether to eliminate Section 22.903 requirements for BOC cellular operations.[20] We note that when SMR service was established in 1974, wireline common carriers were ineligible to hold SMR licenses in order to ensure that the provision of SMR service would be available to small entrepreneurs and to reduce incentives for wireline common carriers to engage in discriminatory interconnection practices; wireline common carriers were eventually permitted to acquire SMR licenses in 1995.[21]

C. *Cincinnati Bell*

9. In *Cincinnati Bell*, the Sixth Circuit found that the Commission had failed to justify adequately the conclusion in the *Broadband PCS Second Report and Order* that the record was insufficient to repeal Section 22.903. The Court held that, in light of our decision that all LECs, including BOCs, could provide broadband PCS without establishing a structurally separate affiliate, we were required -- but had failed -- to give a reasoned

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[18] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7751-52, ¶ 126 (1993), *recon.*, 9 FCC Rcd 5154 (1994) (*Broadband PCS Second Report and Order*); *CMRS Second Report and Order*, 9 FCC Rcd at 1492, ¶ 218.

[19] *See Cellular Reconsideration Order*, 89 FCC 2d at 79-80; *BOC Separation Order*, 95 FCC 2d 1117, 1136-1137 (1983).

[20] *Broadband PCS Second Report and Order*, 8 FCC Rcd at 7751-52 n.98.

[21] *See* Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, GN Docket No. 94-90, *Report and Order*, 10 FCC Rcd 6280, 6288, ¶ 15 (1995) (*SMR Wireline Order*).

explanation for the disparate treatment of BOC provision of cellular and PCS, as well as the disparity in BOC and non-BOC provision of cellular service.[22] The Court ordered the Commission to reexamine whether changed circumstances have either obviated the need for the Section 22.903 structural separation requirements, or rendered them contrary to the public interest.[23] That is the examination that we conduct today.

D. Waivers of Section 22.903

10. A number of BOCs have asked for waivers of the requirements of Section 22.903. On October 23, 1995, we granted the request of Southwestern Bell Mobile Systems (SBMS) to provide integrated cellular and CLLE service outside of Southwestern Bell Telephone Company's (SWBT) local exchange service area.[24] We concluded that the waiver would encourage local loop competition, avoid duplicative costs, and promote increased efficiency. We also found that rigid application of Section 22.903 to out-of-region cellular and landline services would not serve the public interest objectives of the rule, and would impose a significant and unnecessary regulatory burden on a potentially valuable service. US West and Bell Atlantic/NYNEX Mobile, Inc. (BANM) subsequently sought similar waivers, and in the *Notice* we concluded that waiving the rule for out-of-region cellular service would promote competition.[25] We therefore granted all BOCs a waiver of the requirements of Section 22.903 with respect to the provision of out-of-region cellular service.[26]

11. In the *Notice*, we observed that our treatment of BOC out-of-region cellular services could be reconciled with our interim treatment of BOC out-of-region, interstate, interexchange services, in which we permitted nondominant carrier regulation only if such

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[22] *Cincinnati Bell*, 69 F.3d at 765-68. The *Cincinnati Bell* decision also remanded the Commission's cellular attribution rules and cellular/PCS cross-ownership requirements which were addressed in Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824 (1996).

[23] *Cincinnati Bell*, 69 F.3d at 768. Just prior to our release of the *Notice* in this proceeding, BellSouth filed a motion with the Sixth Circuit asking the court to recall its mandate that the Commission reevaluate Section 22.903, and urging the court to vacate the rule itself. The Sixth Circuit denied BellSouth's request. *Cincinnati Bell Telephone Company v. FCC*, 96 F.3d 849 (6th Cir. 1996).

[24] Motion of Southwestern Bell Mobile Systems, Inc., *Memorandum Opinion and Order*, 11 FCC Rcd 3386, 3397, ¶ 24 (1995) (*SBMS Waiver Order*).

[25] *Notice*, 11 FCC Rcd at 16668, ¶ 57. We explained that, in the case of BANM, for example, Section 22.903 would continue to apply to the provision of cellular services in the in-region geographic exchange areas served by the two landline carriers, Bell Atlantic and NYNEX, but would cease to apply to cellular services provided by BANM in out-of-region local exchange service areas not served by either Bell Atlantic or NYNEX. *Id.* at n.95.

[26] *Id.* at 16668, ¶ 57.

services are provided through a separate affiliate that complies with our *Competitive Carrier Fifth Report and Order* rules.[27] We concluded that the difference in treatment could be justified by the differing natures of the services and markets at issue.[28] Section 271(b) of the Communications Act authorized BOCs to provide interLATA services originating outside their in-region states; thus, the BOCs have only just begun to enter out-of-region interLATA markets. Interexchange carriers, the BOCs' competitors for interexchange service, are also customers of the BOCs' in-region access services. Out-of-region cellular activities, on the other hand, do not need such a regulatory approach because cellular calls seldom entail operations both outside and inside a BOC's exchange access service area, and out-of-region unaffiliated cellular carriers (the BOCs' competitors) normally do not have a need for access to the BOCs' in-region local exchange network, and therefore are not the BOCs' customers.[29]

12. On August 25, 1995, BellSouth sought authorization to engage in in-region resale of cellular service without the structural separations required by Section 22.903.[30] BellSouth's goal in doing so was to provide integrated landline local exchange, cellular, and PCS through its incumbent LEC, BellSouth Telecommunications, Inc. (BST), by reselling the cellular and PCS service of its own affiliates, as well as that of unaffiliated providers. BellSouth later withdrew its request.[31]

13. On October 11, 1995, Ameritech Communications, Inc. (ACI), a structurally separate subsidiary of Ameritech Corporation, requested a waiver of Section 22.903 to provide integrated in-region local exchange, long distance, and cellular service. ACI's waiver request

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[27] *See* Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, *Report and Order*, 11 FCC Rcd 18564 (1996) (*Interim BOC Out-of-Region Order*) *recon. pending.* Specifically, we removed dominant regulation for BOCs that provide out-of-region, interstate, interexchange services through a separate affiliate that complies with the following safeguards: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the LEC, and (3) acquire the LEC's services only via the LEC's tariffs. *Interim BOC Out-of-Region Order*, 11 FCC Rcd at 18574-77, ¶¶ 19-23. The *Interim BOC Out-of-Region Order* was superseded by the *Dom/Nondom Order. See* Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, FCC 97-142 (rel. Apr. 18, 1997) (*Dom/Nondom Order*), *Reconsideration Order*, FCC 97-229 (rel. June 27, 1997).

[28] *Notice*, 11 FCC Rcd at 16667, ¶ 56 & n.96.

[29] *Id.*

[30] BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Cellular Corp. Petition for Declaratory Ruling, *Order*, 11 FCC Rcd 1439 (1995). *See also Notice*, 11 FCC Rcd at 16651, ¶ 21.

[31] *See Ex Parte* Letter from Jim O. Llewellyn, BellSouth, to William F. Caton, Acting Secretary, FCC (dated Feb. 12, 1996).

was limited to the provisions of Section 22.903 that (1) prohibit a BOC-affiliated cellular carrier from owning landline facilities, and (2) prohibit a BOC from engaging in the sale and promotion of cellular service on behalf of its affiliate. In August 1996, the Commission concluded that ACI's status as a structurally separate subsidiary of Ameritech, separate from Ameritech's cellular operations, considerably alleviated any concerns regarding improper cost allocation or discrimination and granted ACI a waiver that permitted it to own landline facilities in-region.[32] This aspect of the Ameritech waiver is discussed in greater detail in Section IV.D, *infra*. With respect to joint sale and promotion, the Commission concluded that the joint marketing and resale activities outlined by ACI in its waiver petition were permitted by Section 601(d) of the 1996 Act and accordingly included a declaratory ruling to that effect.

14. On April 17, 1996, the Wireless Telecommunications Bureau allowed US West to provide cellular service on a temporary basis directly to local exchange customers awaiting installation of landline service (*i.e.*, such service did not have to be provided via a structurally separate affiliate).[33] The Bureau concluded that grant of the waiver was in the public interest because it permitted subscribers experiencing delays in obtaining landline telephone service to gain access to the public switched network via temporary cellular service. It also found that US West demonstrated special circumstances because the waiver involved a small number of customers who would otherwise not be connected to the public switched network. The Bureau further concluded that US West would gain no anticompetitive advantage in the provision of cellular service. As a condition of the waiver, the Bureau required US West to file changes in its Cost Allocation Manual (CAM), required under Part 64 of the Commission's Rules, to reflect as "below the line" all expenses generated by US West's resale of cellular service. The waiver was granted for a period of one year, and US West was required to provide a quarterly report detailing participation in the cellular loaner program.[34] On June 27, 1996, Ameritech similarly requested a waiver of Section 22.903 to permit it to make free temporary local cellular service available from its landline telephone exchange

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[32] Petition of Ameritech Communications, Inc. for Partial Waiver of Section 22.903 of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC 6331 (1996) (*ACI Waiver Order*).

[33] Request of US West Communications, Inc. for a Limited Waiver of Section 22.903 of the Commission's Rules, *Order*, 11 FCC Rcd 10905 (WTB 1996).

[34] US West subsequently requested a one-year extension of the waiver, and was granted a temporary extension pending a decision on that request. *See* Wireless Telecommunications Bureau Seeks Comment on US West Communications, Inc. Request for Extension of Limited Waiver of Section 22.903 of the Commission's Rules, *Public Notice*, DA 97-766 (rel. Apr. 14, 1997).

service operations in Ohio to landline residential customers who are experiencing service interruptions. That request remains pending.[35]

E. Notice of Proposed Rulemaking and PacTel Plan

15. In the *Broadband PCS Second Report and Order*, the Commission declined to impose additional cost-accounting rules on LECs that provide broadband PCS service other than those rules already contained in Parts 32 and 64 of the Commission's rules.[36] The Commission also declined to impose a structural separation requirement on BOCs or other LECs providing PCS. Instead, the Commission stated that commencement of broadband PCS operations by LECs would be contingent on the LECs' implementing an acceptable plan for nonstructural safeguards against discrimination and cross-subsidization.[37] Following those requirements, PacTel filed and received approval for a safeguards plan to offer broadband PCS.[38] The main elements of the PacTel plan were (1) establishing a separate PCS affiliate for accounting purposes, (2) complying with Parts 32 and 64 of the Commission's rules, and (3) complying with the *Computer III*[39] CPNI and network disclosure rules.[40] The 1996 Act,

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[35] *See* Wireless Telecommunications Bureau Seeks Comment on Ameritech Request for Limited Waiver of Section 22.903 of the Commission's Rules to Facilitate Provision of Temporary Cellular Service in the State of Ohio, *Public Notice*, DA 97-383 (rel. Feb. 20, 1997), *erratum* DA 97-388 (rel. Feb. 21, 1997).

[36] *See* 47 C.F.R. §§ 32.27 and 64.902.

[37] *Broadband PCS Second Report and Order*, 8 FCC Rcd at 7748 n.96.

[38] PacTel filed its safeguards plan (hereinafter, "PacTel plan") on July 10, 1995. In an *Order* released on February 27, 1996, the Wireless Telecommunications Bureau approved the PacTel plan, subject to the outcome of this proceeding. Amendment of the Commission's Rules to Establish New Personal Communications Services, Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services' Plan of Nonstructural Safeguards Against Cross-Subsidy and Discrimination, GEN Docket No. 90-314, *Order*, DA 96-256 (WTB) (rel. Feb. 27, 1996).

[39] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986), *recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); Phase II, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989), *vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review den., California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *recon. dismissed in part*, Order, CC Docket Nos. 90-623 & 92-256, 11 FCC Rcd 12513; *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S.Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding). The Commission is currently reviewing the nonstructural safeguards for BOC provided enhanced services in Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, *Notice of Proposed Rulemaking*, 10 FCC Rcd 8360 (1995).

which was enacted after PacTel filed its plan, imposes additional requirements with respect to CPNI, network disclosure rules, and interconnection.

16. In the *Notice*,we observed that the BOCs currently retain market power in the local exchange market because they control bottleneck facilities and serve the vast majority of customers within their service areas, and other carriers must seek interconnection from the BOC.[41] To address this issue, we proposed two options as alternatives to the existing structural safeguards for BOC cellular operations, and asked commenters to submit information regarding the costs of the structural separation requirement:[42] (1) to retain the structural separations requirements of Section 22.903 for BOC provision of in-region cellular service, but sunset the restrictions for a particular BOC when that BOC receives authorization to provide interLATA service originating in any in-region state; or (2) to eliminate the structural safeguards of Section 22.903 immediately in favor of uniform safeguards for all Tier 1 LEC provision of broadband CMRS.[43] With respect to both options, we proposed to replace Section 22.903 with safeguards similar to those adopted by the Commission in the *Competitive Carrier Fifth Report and Order*.[44] In that order, the Commission concluded that, in order to qualify for treatment as a nondominant carrier, an independent local exchange company must provide interstate interexchange services through a separate affiliate that (1) has separate books of account; (2) does not jointly own transmission or switching facilities with that local exchange company; and (3) acquires any services from the affiliated local exchange carrier at tariffed rates, terms, and conditions. In addition, the Commission subjected the affiliate to the Commission's joint cost and affiliate transaction rules. In the *Notice*, we proposed a similar framework of safeguards for Tier 1 LECs providing in-region

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[40] Additionally, PacTel stated that it did not discriminate in the provision of interconnection; that interconnection would be governed by its intrastate interconnection tariff pending before the California Public Utilities Commission. PacTel further stated that while the tariff is pending, interconnection would be provided on a contract basis, and PacTel would make Pacific Bell Mobile Services' contract with Pacific Bell available to third parties upon request, under a non-disclosure agreement.

[41] *Notice*, 11 FCC Rcd at 16661, ¶ 42.

[42] *Id.* at 16665-66, ¶¶ 50-52.

[43] *Id.* at 16678-80, ¶¶ 77-83.

[44] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, *Fifth Report and Order*, 98 FCC 2d 1191, 1198, ¶ 9 (1984) (*Competitive Carrier Fifth Report and Order*). In the *Dom/Nondom Order* we modified somewhat the *Competitive Carrier Fifth Report and Order* requirements by eliminating the option that an independent LEC could offer in-region interstate interexchange service on an integrated basis subject to dominant carrier regulation and by eliminating the *Competitive Carrier Fifth Report and Order* requirements for the provision of out-of-region interstate, interexchange service.

broadband CMRS based on the PacTel Plan for provision of broadband PCS.[45] Specifically, we proposed that Tier 1 LECs providing broadband PCS and other broadband CMRS file with the Commission for approval a safeguards plan that includes the following elements:

(1) A description of a separate affiliate for the provision of CMRS;
(2) A description of planned compliance with our Part 64 and Part 32 accounting rules, with copies of the relevant cost accounting manual (CAM) changes attached;
(3) A description of planned compliance with all outstanding interconnection obligations;
(4) A description of compliance with all outstanding network disclosure rules; and
(5) A description of planned compliance with the CPNI requirements in new Section 222 of the 1996 Act.[46]

IV. COMMENTS

17. The BOCs and GTE argue that Section 22.903 should be eliminated because there is no evidence of anticompetitive conduct to justify continued or expanded structural separation,[47] and that price cap regulation, and the interconnection, resale, and unbundling obligations imposed by the 1996 Act provide sufficient protection against potential anticompetitive conduct.[48] Several commenters contend that LECs cannot cross-subsidize wireless services because the market will not permit the incumbent LECs to raise rates for basic local exchange service, and under price caps, the concept of cross-subsidy is meaningless because rates are not dependent on underlying costs.[49] Ameritech argues that, with the continuing entry of competitive providers of local exchange and access services, and especially with the ability of competing carriers to obtain interconnection and access to unbundled network elements at cost-based rates, incumbent LECs are limited in their ability

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[45] *Notice*, 11 FCC Rcd at 16692-99, ¶¶ 111-126.

[46] As discussed in Section V.F., *infra*, we have recently initiated a separate proceeding to consider the formulation of CPNI regulations to apply to all telecommunications carriers pursuant to new Section 222 of the Communications Act, as amended by the 1996 Act. *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, *Notice of Proposed Rulemaking*, 11 FCC Rcd 12513 (1996) (*CPNI NPRM*).

[47] *See, e.g.*, Bell Atlantic/NYNEX Reply Comments at 11; BellSouth Comments at 17; GTE Comments at 7 (no complaints of anticompetitive conduct have been filed against non-BOC Class A LECs); SBC Comments at 4; Pacific Bell December 4, 1996 *ex parte* Comments at 5.

[48] *See, e.g.*, Ameritech Comments at 6-7; Bell Atlantic /NYNEX Reply Comments at 13-14; GTE Comments at 9; SBC Comments at 4; US West Comments at 7;Pacific Bell December 4, 1996 *ex parte* Comments at 4; US West November 19, 1996 *ex parte* Comments at 6.

[49] Ameritech Comments at 7; Pacific Bell December 4, 1996 *ex parte* Comments at 4.

to implement a cross-subsidization scheme that involves raising rates for basic local and exchange access services.[50] Additionally, Bell Atlantic/NYNEX argues that Section 272(a) of the Communications Act permits BOCs to offer CMRS without employing a structurally separate affiliate.[51]

18. On the other hand, several non-BOC commenters argue that Section 22.903 should be retained because the BOCs continue to have the ability and incentive to allocate costs improperly, discriminate against the affiliate's competitors, and engage in predatory price squeezes and other anticompetitive conduct.[52] Commenters argue that price cap regulation cannot eliminate the ability or incentive for such cross-subsidization because the current price caps framework is not a "pure" price cap scheme. Commenters argue that the sharing mechanism, low end adjustment, and the periodic readjustment of the productivity factor creates additional incentives to allocate costs improperly.[53] Commenters also contend that the Part 32 and 64 cost allocation rules do not provide a mechanism to assure that costs are properly allocated.[54] They also note that, while the BOCs claim that a structural separation requirement imposes costs, none of the BOCs quantifies those costs.[55] In addition, several commenters offer examples of alleged anticompetitive conduct by the BOCs as evidence that

[50] Ameritech Reply Comments at 5.

[51] Bell Atlantic/NYNEX Comments at 11-12.

[52] *See, e.g.,* AT&T Wireless Comments at 6-7; MCI Comments at 5; Public Utilities Commission of Ohio (PUCO) Comments at 22; CMT Reply Comments at 5-6; Comcast Reply Comments at 3-5.

[53] *See, e.g.,* AirTouch Comments at 3; AT&T Wireless Comments at 8 & Reply Comments at 8-9; MCI Comments at 9-10; PUCO Comments at 7; Comcast Comments at 13 (alleging that current price cap regulation allows LECs to "game the system" on a yearly basis by moving from high price caps with no sharing to lower price caps with sharing as anticipated revenues and future sharing obligations dictate; if LECs misallocate costs to regulated telephony, therefore artificially depressing telephony earnings, virtually all the productivity benefit from the price cap would be lost).

[54] Comcast Comments at 11-12; Cox Comments at 6-7.

[55] *See, e.g.,* Comcast Comments at 6-7; Cox Comments at 3; Comcast Reply Comments at 6; CMT Reply Comments at 7.

the structural safeguards should be retained.[56] In reply comments, the BOCs deny the alleged improprieties.[57]

19. With respect to regulatory symmetry, both among like providers and among like services, the BOCs and GTE contend that Section 22.903 cannot be justified because it restricts only the BOCs, but not other LECs, and regulates only the provision of cellular services even though other wireless services compete with and are substitutes for cellular.[58] BOC commenters argue that any rule establishing safeguards must promote regulatory symmetry; otherwise the Commission must justify disparate regulation.[59] They further contend that the costs and inefficiencies imposed on the BOCs due to structural separation are not borne by other CMRS providers, and that any such costs or inefficiencies due to regulation should be the same for all CMRS providers.[60] Pacific Bell contends that it has integrated its PCS operations with its wireline business, and that separating the two would be expensive.[61] BOC commenters further observe that cellular and PCS are subject to the same interconnection policies, offer similar features and functionalities to customers, compete on the basis of price, quality and services, and that the only fundamental difference between the two services is the frequency band on which they operate.[62] Non-BOC commenters, agreeing that regulatory symmetry is appropriate, argue that *Cincinnati Bell* does not require the elimination of structural safeguards and that the Commission should instead extend structural safeguards to BOC provision of all CMRS.[63]

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[56] *See, e.g.*, PUCO Comments at 6 (Ameritech allegedly improperly allocating costs to regulated and nonregulated accounts) and 9 (Ameritech allegedly improperly using customer information obtained from Voice-Tel to solicit Voice-Tel customers); AT&T Wireless Reply Comments at 3-4 (LECs continue to refuse to pay compensation for terminating their traffic on CMRS networks and they charge CMRS providers higher interconnection rates than those charged to landline competitors); Radiofone Comments at 1-4 (alleged discrimination and anticompetitive conduct by BellSouth)

[57] *See, e.g.*, Ameritech Reply Comments at 2-3; *Ex Parte* Letter from David G. Frolio, BellSouth, to William F. Caton, Acting Secretary, FCC (dated Jan. 7, 1997).

[58] *See, e.g.*, Bell Atlantic/NYNEX Comments at 10; BellSouth Comments at 12; GTE Comments at 20-22; SBC Comments at 16-17.

[59] Bell Atlantic/NYNEX Comments at 7-8; BellSouth Comments at 14; GTE Comments at 21-22.

[60] BellSouth Comments at 12-13; SBC Comments at 6.

[61] Pacific Bell December 4, 1996 *ex parte* Comments at 2.

[62] Bell Atlantic/NYNEX Comments at 19-20; BellSouth Comments at 15; SBC Comments at 16-17.

[63] *See, e.g.*, AT&T Wireless Comments at 11; CMT Comments at 14; Comcast Comments at 8.

20. Independent LECs vigorously oppose the imposition of a separate affiliate requirement.[64] GTE notes that it is not now required to have a separate affiliate for the provision of CMRS and that imposition of such a requirement would be contrary to the deregulatory spirit of the 1996 Act.[65] GTE argues that there are significant distinctions between independent LECs and the BOCs; independent LECs are much less geographically concentrated than the BOCs, serve less densely populated areas and offer fewer access lines than the BOCs.[66] GTE further submits that an independent LEC is dependent on interconnection with other LECs for a substantial portion of its affiliated CMRS systems, in contrast to a BOC, which has a significantly higher level of CMRS/LEC coverage overlap and extensive networks interconnection points within its service area.[67] GTE further notes that the structural separation requirements included in the in-region, interLATA provisions of Sections 271 and 272 of the 1996 Act apply only to the BOCs and not to other independent LECs, and it suggests that this is evidence of Congressional intent to treat independent LECs and the BOCs differently.[68] On the other hand, BellSouth argues that the non-BOC, Class A LECs are the sole incumbent LECs in their franchise areas, and that other CMRS providers must obtain interconnection from incumbent LECs in a market regardless of whether that LEC is a BOC.[69]

21. Several commenters contend that the separate affiliate requirement should not be extended to non-Class A and rural LECs.[70] These commenters contend that there is no basis for imposing additional regulatory burdens on small and rural LECs who seek to provide CMRS, and that the costs of such additional regulation would be significant.[71] NTCA and RTG argue that structural separation could deter rural telephone companies from participating in the wireless market, and deny rural Americans access to wireless technology.[72] RCA

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[64] *See, e.g.*, ALLTEL Comments at 2; CBT Comments at 2; GTE Comments at 14; RCA Comments at 5; RTG Comments at 2; PUCO Comments at 18; ITTA May 12, 1997 *ex parte* Comments at 1.

[65] GTE Comments at 28-29.

[66] *Id.* at 15.

[67] *Id.* at 17.

[68] *Id.* at 18-19.

[69] BellSouth Reply at 7.

[70] National Telephone Cooperative Association (NTCA) Comments at 3-6; Rural Cellular Association (RCA) Comments at 1; Rural Telecommunications Group (RTG) Comments at 2.

[71] NTCA Comments at 3; RCA Comments at 5; RTG Comments at 2.

[72] NTCA Comments at 4; RTG Comments at 4.

observes that rural telephone companies serve smaller geographic and less densely populated areas, and that it is less likely that their wireless service areas would correspond directly with their wireline service areas.[73]

22. Independent LECs contend that, if a separate affiliate requirement is imposed on them, the Commission should use some dividing line other than the Tier 1/Tier 2 (*i.e.*, Class A/Class B) distinction. ALLTEL, CBT, and ITTA contend that, instead of using the Tier 1 definition as a cutoff point, the Commission should exempt LECs with fewer than two percent of the nation's access lines because these carriers lack the anticompetitive potential to retard competition.[74] ITTA argues that there is no support in the record for the proposition that LECs with fewer than two percent of the subscriber lines have used their bottleneck facilities to engage improperly in anticompetitive behavior.[75] ITTA suggests, alternatively, that the Commission only apply separate affiliate requirements if the CMRS provider has at least 10 MHz of spectrum, or 10 percent of the available licensed spectrum.[76] PUCO argues that smaller Class A LECs might not have the resources to comply with nonstructural safeguards, and lack the market power of the BOCs or other Class A LECs to hinder emerging competition.[77] BellSouth counters that the percentage of access lines a particular company has nationwide provides no basis for deciding whether that company has the ability and incentive to engage in discriminatory pricing, interconnection abuse, cross-subsidization, or leveraging of local exchange market power in specific markets.[78] GTE similarly argues that the two percent benchmark is an arbitrary cutoff point.[79]

23. While the BOCs do not discuss extensively the LEC/CMRS safeguards proposed in the *Notice*, some of them contend that filing a safeguards plan is not necessary to guard against anticompetitive behavior. For example, Bell Atlantic/NYNEX, SBC, and Pacific Bell contend that a nonstructural safeguards plan whereby the LEC would describe how it intended to comply with Part 32 and Part 64 accounting rules, CPNI, interconnection, and network disclosure obligations would merely force the LEC to describe obligations they are already

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[73] RCA Comments at 5-6.

[74] ALLTEL Comments at 3; CBT Comments at 4; ALLTEL Reply Comments at 3; ITTA May 12, 1997 *ex parte* Comments at 1.

[75] ITTA May 12, 1997 *ex parte* Comments at 1.

[76] *Id.* at 2.

[77] PUCO Comments at 17.

[78] BellSouth Reply at 9-10.

[79] GTE Reply Comments at 13-14.

required to meet and would therefore not provide any additional protection.[80] In *ex parte* comments, some BOCs urge the Commission not to adopt a separate affiliate requirement.[81]

24. GTE contends that regardless of whether Section 22.903 is retained for the BOCs, the rule should not be extended to independent LECs because there are material distinctions between the independent LECs and the BOCs.[82] CMT counters that the obligation for regulatory symmetry extends only to similarly situated entities, and that, by virtue of their size and monopoly status as providers of local exchange services, Class A LECs are uniquely situated.[83] CMT contends that the underlying rationale for regulatory symmetry can be furthered only by applying regulatory safeguards, such as structural separation, to remove substantial competitive advantages that Class A LECs would otherwise possess.[84]

25. The commenters that addressed the option of establishing a sunset period for Section 22.903 contend that structural safeguards should remain in effect for a particular BOC as long as the BOC is dominant in the provision of telephone exchange service in its market.[85] Radiofone suggests revisiting the issue of sunsetting structural safeguards after 10 years.[86] On the other hand, BellSouth disagrees with the proposal to continue structural separations until a BOC has been authorized under Section 271(d) to provide in-region interLATA service. It contends that the competitive checklist was designed to address the ability of the BOC to provide long distance and manufacturing services and has nothing to do

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[80] *See, e.g.*, Bell Atlantic/NYNEX Comments at 16; SBC Comments at 18; Pacific Bell Comments at 3.

[81] *See, e.g., Ex Parte* letter from Ben G. Almond, BellSouth, to William F. Caton, Acting Secretary, FCC (dated Jan. 27, 1997); *Ex Parte* letter from Eldridge Stafford, US West, to Karen Brinkmann, FCC (dated Dec. 20, 1996) (arguing that a separate affiliate requirement for provision of PCS would require them to restructure their accounting system).

[82] GTE Comments at 14. GTE argues that the independent LECs are much less geographically concentrated than the BOCs, serve less densely populated areas, and (with the exception of offshore points) offer fewer access lines in any state than do the BOCs. In addition, GTE contends that the independent LECs have on average smaller switches and transmission facilities than the BOCs, and lack the interexchange network of the more geographically compact BOCs. GTE Comments at 14-15.

[83] CMT Reply Comments at 10.

[84] *Id.*

[85] CMT Reply Comments at 3; Cox Comments at 3 n.7; AT&T Wireless Comments at 14-15. AT&T Wireless also suggests sunsetting the effectiveness of Section 22.903 for a particular BOC contemporaneously with its sunset of the structural separations requirements for BOC provision of in-region interLATA service rather than in tandem with the BOC's initial receipt of interLATA authorization. AT&T Wireless Comments at 18. MCI proposes retaining structural safeguards until there is significant CMRS competition. MCI Comments at 19-20.

[86] Radiofone Comments at 11.

with whether the BOC should be able to provide cellular service without structural separation.[87]

26. Several commenters discussed the extent to which CMRS affiliates of LECs should be permitted to own landline local exchange facilities. AT&T Wireless and MCI contend that the Commission should prohibit a BOC affiliate from owning both cellular and landline local exchange facilities, just as the BOC itself cannot own both types of plant.[88] AT&T Wireless argues that a BOC affiliate is not a new entrant for the provision of competitive landline local exchange service (CLLE), but is an arm of the affiliated BOC, with concomitant monopoly power and incentives to act in an anticompetitive manner.[89] MCI contends that the safeguards of Sections 271 and 272 will be worthless if BOCs are permitted to circumvent the safeguards by providing in-region interLATA services and local exchange services through the same affiliate.[90] MCI argues that, if the Commission amends Section 22.903(a) to permit BOC cellular services to be provided on an unseparated basis with CLLE services, the affiliate providing such services should be prohibited from owning any landline facilities for the provision of interLATA services or engaging in the provision of landline interLATA services in any way in the BOC's local service region.[91] GTE, on the other hand, contends that permitting LECs to jointly own transmission and switching facilities is critical to competition, given the emergence of hybrid technologies and the development of multi-purpose switching architecture.[92]

V. DISCUSSION

A. General Issues Regarding Incumbent LEC Provision of CMRS

27. The safeguards of Section 22.903 were originally implemented to protect the cellular market from three potential anticompetitive practices: improper cost allocation,

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[87] BellSouth Comments at 42-43.

[88] AT&T Wireless Comments at 17; MCI Comments at 15.

[89] AT&T Wireless Comments at 16-17.

[90] MCI Comments at 16-17; MCI Reply Comments at 6-7.

[91] MCI Comments at 17.

[92] *See Ex Parte* letter from Carol L. Bjelland, GTE, to Karen Brinkmann and Jane Halprin, FCC (dated Jan. 30, 1997); *see also Ex Parte* letter from Ben G. Almond, BellSouth, to William F. Caton, Acting Secretary, FCC (dated Jan. 27, 1997) (urging Commission to eliminate proposed restrictions on shared facilities).

interconnection abuses, and unfair "price squeezes," each of which is described below.[93] Although Section 22.903 was intended to apply only to cellular service, the anticompetitive practices it was meant to address are by their nature not unique to cellular service, but can occur any time a competing service provider requests interconnection with a local exchange network. That is because LECs that own CMRS subsidiaries have the incentive to engage in such anticompetitive practices in order to benefit their own CMRS subsidiaries and to protect their local exchange monopolies from wireless competition. At the same time, LEC control of bottleneck local exchange facilities -- upon which competing CMRS providers must rely -- gives LECs the opportunity to engage in anticompetitive behavior.

28. Improper cost allocation occurs when a LEC shifts costs from its CMRS subsidiary to its regulated local exchange service. Cost shifting has the effect of both subsidizing the LEC's CMRS subsidiary, thus giving the subsidiary a substantial competitive advantage over non-LEC affiliated CMRS providers, and of raising the costs borne by the LEC's captive local exchange ratepayers.[94]

29. Discrimination results when a LEC uses its control over bottleneck local exchange facilities to discriminate against competitors to the LEC's CMRS subsidiary by providing inferior interconnection services. Such discrimination can take many forms, such as providing inferior quality interconnection, providing fewer lines (thus reducing the capacity of the competing system to complete calls), delaying the fulfillment of requests for interconnection services, delaying repairs to competitors' interconnection facilities, and providing inferior quality repair services.[95]

30. A "price squeeze" can occur in two ways. First, the LEC can raise the price that it charges for interconnection to all CMRS providers (including the LEC-owned provider), forcing competing carriers either to raise their retail prices or accept a reduction in their profit margins. As a result, the LEC has a competitive advantage: if CMRS competitors raise their prices, the LEC CMRS affiliate can keep its prices low to attract greater market share, while the parent company reaps offsetting profits as the result of the higher interconnection fees. If competitors do not raise their prices, they will reap lower profits, while the LEC as a whole

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[93] *See* Cellular Communications Systems, 86 FCC 2d 469 (1981), *recon.*, 89 FCC 2d 58 (1982), *further recon.*, 90 FCC 2d 571 (1982); Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, *Report and Order*, 95 FCC 2d 1117 (1983). *See also Non-Accounting Safeguards Order*, 11 FCC Rcd at 21911-14, ¶¶ 10-15.

[94] *See Dom/Nondom Order* at ¶ 103.

[95] *See Dom/Nondom Order* at ¶ 111.

enjoys greater interconnection revenue.[96] In the second type of price squeeze, the LEC does not raise interconnection prices but relies on the fact that the price for interconnection is greater than the economic cost of providing the service. In that situation, the LEC-owned CMRS provider may set its end-user CMRS rates below those of its competitors while remaining profitable on a company-wide basis. This may arise because the LEC, in setting CMRS end-user rates, considers the actual economic cost of interconnection, while for CMRS competitors, the cost of interconnection is the interconnection rates the incumbent LEC charges. Thus, non-cost based pricing of interconnection enables the LEC-owned CMRS provider to increase its market share at the expense of its non-LEC competitors.[97]

31. As discussed more fully below, requiring LECs to create a separate affiliate for the provision of CMRS services helps deter the LECs' incentive and ability to engage in the foregoing anticompetitive practices and facilitates their detection. Arm's length transactions between LECs and their CMRS affiliates and the requirement that agreements be reduced to writing will help the Commission and competing CMRS providers to detect -- and then to address -- competitive abuses. Ease of detection will, in turn, deter a LEC from engaging in such abuses in the first place.

32. We note that the 1996 amendments to the Communications Act include new requirements for structural safeguards for certain other services that rely on interconnection with LEC exchange facilities. For example, Section 272(a) permits a BOC (including any affiliate) that is an incumbent local exchange carrier to manufacture equipment, originate in-region interLATA telecommunications services, other than incidental and previously authorized interLATA services, and provide certain interLATA information services only if it does so through one or more separate affiliates.[98] Each of the separate affiliates must operate independently from the BOC, maintain separate books, records, and accounts in the manner prescribed by the Commission, have separate officers, directors, and employees from the BOC, and conduct all transactions with the BOC on an arm's length basis, with all such transactions reduced to writing and available for public inspection.[99] In its dealings with its separate affiliate, the BOC must also account for all transactions in accordance with accounting principles designated or approved by the Commission. By imposing such requirements, Congress has indicated its view that structural separation remains a useful tool in certain cases to combat competitive abuses by market participants that control bottleneck facilities.

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[96] *See Dom/Nondom Order* at ¶ 125; Access Charge Reform, CC Docket No. 96-262, *First Report and Order*, FCC 97-158 (rel. May 16, 1997) (*Access Charge Reform Order*) at ¶ 275.

[97] *See Dom/Nondom Order* at ¶ 127.

[98] 47 U.S.C. § 272(a). *See Non-Accounting Safeguards Order*, 11 FCC Rcd 21905 (1996).

[99] 47 U.S.C. § 272(b).

33. We recognize that, in the past, we have applied structural separation requirements in the wireless context only to BOC provision of cellular service. In the *PCS* and *CMRS* dockets, we concluded that nonstructural accounting safeguards were sufficient to protect against improper cost allocations and interconnection discrimination by LECs providing PCS or other CMRS.[100] The accounting safeguards prescribe the way incumbent LECs, including BOCs, must account for transactions with their affiliates and allocate costs incurred in the provision of regulated and unregulated services.[101] These safeguards can be divided into the two broad categories of affiliate transactions rules and cost allocation rules. The Commission's affiliate transactions rules, included in Section 32.27 of the Commission's rules, govern how companies should record for accounting purposes such transactions as a transfer of assets or provision of service between a LEC and a LEC affiliate. The cost allocation rules, included in Parts 32 and 64 of the Commission's rules, provide a basic framework for separating costs between the LEC's regulated activities (such as provision of local exchange service) and nonregulated activities (such as provision of wireless service).[102]

34. Not only did the Commission, prior to divestiture, apply structural separation in the wireless context only to cellular service, but in formulating rules for cellular service, we decided to apply the structural separation rules only to the BOCs, and not to the non-BOC LECs in the provision of cellular service. The Commission determined at the time that the benefits of structural separation did not outweigh the costs that such a requirement would impose on LECs other than AT&T.[103] After divestiture, that decision was subsequently extended to BOC provision of cellular services.[104]

35. Commenters in this proceeding argue that disparate treatment among CMRS providers is contrary to the congressional intent of the 1993 Budget Act and the 1996 Act. They also note that the *Cincinnati Bell* decision requires that our rules treat similar services and similar service providers consistently. Commenters argue that cellular and PCS are subject to the same interconnection policies, offer similar features and functionalities to customers, compete on the basis of price, quality and services, and that the only fundamental

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[100] *See Broadband PCS Second Report and Order*, 8 FCC Rcd at 7751-52, ¶ 126; *CMRS Second Report and Order*, 9 FCC Rcd at 1492, ¶ 218.

[101] *See Accounting Safeguards Order*, 11 FCC Rcd at 17550-51, ¶ 25.

[102] The Commission has chosen to forbear from rate regulation of wireless services. Pursuant to Section 32.23 of the Commission's rules, preemptively deregulated activities and activities (other than incidental activities) never subject to regulation are classified as "nonregulated" for accounting purposes. 47 C.F.R. § 32.23(a).

[103] Cellular Communications Systems, *Memorandum Opinion and Order on Reconsideration*, 89 FCC 2d 58, 78, ¶ 44 (1982).

[104] *BOC Separation Order*, 95 FCC 2d at 1136-37.

difference between the two services is the frequency band on which they operate. We agree that our rules should treat similar services consistently and that any structural separation requirements should be uniform to avoid disparate treatment. Our choices for achieving regulatory symmetry are either to extend the Section 22.903 structural safeguards for BOC provided cellular service to all LECs and all CMRS services, or to eliminate Section 22.903 in favor of less restrictive safeguards applicable to the provision of all broadband CMRS.

36. We also note that significant developments have occurred in the CMRS market, such as the potential for fixed wireless technology to offer a competitive alternative to the incumbent LEC network, that may increase the incentive for anticompetitive behaviors such as discriminatory interconnection. We believe that in the wake of the development of fixed wireless services, incumbent LECs and CMRS operators are increasingly likely to be direct competitors. The competitive pressure brought to bear on the local exchange market by CMRS providers could increase the incentive for LECs to engage in discriminatory and other anticompetitive practices.

B. Separate Affiliate Requirements for In-Region Incumbent LEC Provision of CMRS

1. Overview

37. Anticompetitive interconnection practices, particularly discriminatory behavior, pose a substantial threat to full and fair competition in the CMRS marketplace, and all LECs, not just the BOCs, have the ability and incentive to engage in anticompetitive behavior. Indeed, the increased competition in the CMRS market and the possibility that CMRS in the future may substitute for wireline local loops may actually increase LECs' incentive to discriminate against unaffiliated CMRS providers. At the same time, however, there are ways to lessen the threat of discrimination, predatory price squeezes, and cost misallocation that are less burdensome than the requirements currently imposed by Section 22.903. For example, as we recognized in the *Dom/Nondom Order* and in the *Access Charge Report and Order*, accounting safeguards, Section 251 of the Communications Act and related interconnection rules, and price cap regulation all serve to protect local exchange ratepayers from bearing the costs and risks of the telephone companies' other nonregulated activities and reduce the likelihood that LECs will raise interconnection rates in order to effect a predatory price squeeze. Such mechanisms do not, however, eliminate the possibility of interconnection discrimination. In this Order, we therefore strike a new balance by replacing Section 22.903 as it currently exists with a less restrictive separation requirement. Although the new rules will be substantially less restrictive than Section 22.903, they will apply to all LECs, except as described in section V.C, below, not just BOCs, and will apply to all types of broadband CMRS rather than just cellular.